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Supreme Court, U.S.
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No. 03-1451

IN THE

Supreme Court of the United States

COLLEEN P. KRAMER,

Petitioner,

v.

BANC OF AMERICA SECURITIES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held, in an issue of first impression among the federal circuit courts of appeals, that a plaintiff who brings a claim of retaliation against an employer under the Americans with Disabilities Act cannot recover compensatory and punitive damages and therefore has no right to a jury trial.

RULE 29.6 STATEMENT

Respondent Banc of America Securities, LLC, is a subsidiary of NationsBanc Montgomery Holdings Corporation; NB Holdings Corp.; and Bank of America Corporation.

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STATEMENT OF THE CASE

Petitioner Colleen P. Kramer sued her former employer, Banc of America Securities, LLC ("BOA") for, among other things, retaliatory discharge in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. (the "ADA"). A judge of the United States District Court for the Northern District of Illinois dismissed the disability discrimination count of her complaint on summary judgment but allowed her to proceed to trial on her ADA retaliation claim.

Once the disability discrimination count was dismissed, BOA moved to exclude compensatory and punitive damages and to strike Petitioner's jury demand. The district court granted the motion and held a bench trial. At the trial's conclusion the district court found in favor of BOA. Petitioner appealed, claiming that the district court erred when it determined that she was not entitled to compensatory and punitive damages on her retaliation claim and therefore had no right to a jury trial.

The Seventh Circuit affirmed. It held that the plain language of the statute in question, 42 U.S.C. § 1981a(a)(2), which provides for damages for disability discrimination, makes clear that the statute "does not contemplate compensatory and punitive damages for a retaliation claim under the ADA." (App. 8a) Because compensatory and punitive damages were unavailable, and the only remedies she was entitled to seek were equitable ones, the appellate court held that Petitioner had no statutory or constitutional right to a jury trial. (App. 10a) Petitioner now seeks a writ of certiorari. BOA respectfully opposes the petition, for the reasons set out below.

REASONS FOR DENYING THE PETITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari because the decision of the Seventh Circuit Court of Appeals was correct and there is no conflict among the appellate courts on the issue presented.

I. The Seventh Circuit Correctly Held That The Statute Is Clear And Unambiguous.

The Seventh Circuit's statutory analysis is sound and should not be disturbed. When enacted in 1990, the ADA allowed plaintiffs in cases where the alleged disability discrimination arose in an employment setting to pursue the same remedies available under the Civil Rights Act of 1964 (Title VII). Before the enactment of the 1991 Civil Rights Act, Title VII and thus the ADA provided only for equitable remedies and did not allow for compensatory and punitive damages. *See* 42 U.S.C. § 12203 (the retaliation provision of the ADA), 42 U.S.C. § 12117 (the enforcement provision for ADA claims arising in employment) and 42 U.S.C. § 2000e-5(g) (the remedies section of Title VII). The 1991 Civil Rights Act expanded the remedies for some – but not all types of ADA claims. The applicable statute for disability discrimination remedies – 42 U.S.C. § 1981a(a)(2) only lists two types of ADA claims that are subject to the expanded remedies of compensatory and punitive damages – §§ 12112 and 12112(b)(5). As the Seventh Circuit explained, the statute provides, in pertinent part, that:

> "[i]n an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . under . . . section 102 of the [ADA] or committed a violation of

> section 102(b)(5) of the [ADA], against an individual, the complaining party may recover compensatory and punitive damages. . . .

42 U.S.C. § 1981a(a)(2) (App. 6a)

Conspicuously absent is any expansion of the remedies for a retaliation claim against an employer under the ADA. Therefore, because claims of retaliation under the ADA are not listed, compensatory and punitive damages are not available for such claims. Instead, as the Seventh Circuit held, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in 42 U.S.C. § 2000e-5(g)(1). (App. 8a)

It appears that Petitioner now, for the first time, is shifting the focus of her argument from § 1981a(a)(2), the disability provision of the statute, to include a contention that she also was entitled to compensatory and punitive damages under § 1981a(a)(1), the civil rights provision of the statute. (*See* Br. pp. 3, 25) This new contention was not raised in the lower court and is not properly developed in the petition, and therefore should not be given consideration. Moreover, § 1981a(a)(1) is inapplicable because, by its plain terms, it applies to actions brought by a complaining party under Title VII, not under the ADA. The applicable provision is the subsection entitled "Disability" – that is, § 1981a(a)(2).

This Court's canons of statutory construction dictate that where, as here, a statute is clear, there is no need to invoke any other aids to interpretation. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [. . .] When the words of a statute

are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (citations omitted).

II. Petitioner Attempts To Manufacture A Circuit Split Where None Exists.

A. The Only Appellate Court To Directly Address The Issue Since *Kramer* Has Followed The Seventh Circuit's Lead.

A newly issued ruling from the Fourth Circuit, which follows the Seventh Circuit's lead, deflates Petitioner's argument of a circuit split. The district court case *Rhoads v. FDIC,* No. CCB-94-1548, 2002 WL 31755427 (D. Md. Nov. 7, 2002), which Petitioner cites in support of her argument, is not good law. The Fourth Circuit, in its review of the *Rhoads* plaintiff's post-trial appeal, cited the Seventh Circuit's opinion in *Kramer* and held that the plaintiff's claim of compensatory and punitive damages for her employer's alleged violation of the ADA's anti-retaliation provision failed "because such relief is unavailable." *Rhoads v. FDIC, ("Rhoads II"),* No. 03-2373, 2004 WL 817649 (4th Cir. Apr. 16, 2004), (per curiam), citing *Kramer* and affirming on other grounds the district court's decision in *Rhoads v. FDIC*, 286 F. Supp. 2d 532, 537 (D. Md. 2003), that plaintiff could not recover compensatory damages.

While the Fourth Circuit's decision in *Rhoads II* is unpublished and therefore is not binding precedent in the Fourth Circuit pursuant to its Local Rule 36(c), the ruling is the first indication that appellate circuits will follow, not reject, the Seventh Circuit's precise and detailed statutory interpretation in *Kramer.*

B. Petitioner's Concessions Undermine Her Contention That The Circuits Are Split.

Despite Petitioner's overarching argument that the Seventh Circuit's decision conflicts with the "settled legal understandings" of other circuits, the petition is filled with concessions that a true split of the circuits does not exist. Petitioner repeatedly admits – as she must – that no other circuit court of appeal has expressly ruled on the legal question at issue in the *Kramer* case. For example:

- Petitioner states:

> Although other circuit courts of appeals *have not yet specifically analyzed* the "tangle of interrelated statutes" as the Seventh Circuit did, . . . this Court should not wait for further decisions on the question presented because the law in the circuit and district courts is now in conflict and can only become more sharply divided over time.

(Br. p. 6) (emphasis added)

- Petitioner notes that the Seventh Circuit considered and rejected any persuasive value in cited cases from other circuit courts of appeals. While the Seventh Circuit acknowledged that some circuit courts of appeals have affirmed jury verdicts where compensatory damages were awarded on ADA retaliation claims, Petitioner concedes that "the court below stated that *none of these circuit decisions* '*examined the legal question* of whether [compensatory and punitive] damages [under 42 U.S.C. § 1981a(a)(2)] were authorized for an ADA retaliation claim'[.]" (Br. p. 8) (emphasis added)

• Petitioner further concedes that "*the precise issue* of whether a plaintiff is entitled to recover compensatory and punitive damages for a retaliation claim under the ADA *was not specifically analyzed*" in some of the very cases Petitioner attempts to argue are in conflict with the Seventh Circuit's ruling below. (Br. p. 10) (emphasis added)

C. The Appellate Court Cases That Petitioner Cites Are Devoid Of Any Analysis To Support An Inference Of Conflict With The Seventh Circuit.

Indeed, there is a key difference between the Seventh Circuit's opinion in *Kramer* and the other appellate cases that Petitioner cites – the Seventh Circuit squarely addressed the *legal* question of whether compensatory and punitive damages are allowed, while the other appellate courts addressed the *factual* question of whether sufficient evidence supported the claimed damages. Thus, the other appellate courts are not in direct conflict with the Seventh Circuit. None examined the legal question of whether such damages are authorized, but rather the courts appear to have assumed, without deciding, that remedies could include compensatory and punitive damages.

1. Eighth Circuit

Petitioner incorrectly contends that "it is clear" that the Eighth Circuit has confirmed that compensatory and punitive damages are recoverable for an ADA retaliation claim, citing *Salitros v. Chrysler Corp.*, 306 F.3d 562 (8th Cir. 2002) and *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001). (Br. p. 10) Petitioner also cites *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) as authority for approval of jury verdicts awarding compensatory and

punitive damages for retaliation under the ADA. (Br. p. 9) In fact, none of those cases is a clear authority on the question presented here. Even though the *Salitros* and *Foster* decisions affirm awards of compensatory and punitive damages, the rulings do not address whether there is statutory authority for such remedies. In the *Stafne* case, the appellate court affirmed a jury verdict in favor of the *employer* and never reached the legal issue of remedies for an ADA retaliation claim. Thus, it remains an open question how the Eighth Circuit would rule if presented with the precise issue of the unavailability of legal remedies for an ADA retaliation claim in the employment setting.

Petitioner also errs in her description of district court decisions within the Eighth Circuit. She claims that the *Salitros, Foster* and *Stafne* appellate decisions were issued after contrary decisions within the same circuit by Kansas district courts. (Br. p. 9) The Kansas courts, however, are within the Tenth Circuit, not the Eighth Circuit.

2. Second Circuit

Again, the authority that Petitioner cites, *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), simply does not address the question at hand. The Seventh Circuit properly rejected the *Muller* case because it does not provide any statutory analysis of remedies under the ADA.

3. Tenth Circuit

The Tenth Circuit in *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999) did not provide any clear direction on the issue. The case provides no reasoning on the issue of damages for an ADA retaliation claim. The case involved

both a disability discrimination count and a retaliation count under the ADA and there is no indication in the opinion of any apportionment of damages between those two claims. As further proof that the *EEOC v. Wal-Mart Stores, Inc.* decision provides no clear guidance on the legal issue of the available remedies for an ADA retaliation claim, district courts in the Tenth Circuit make no mention of it. Three subsequent district court cases within the Tenth Circuit have held that a plaintiff has no right to compensatory and punitive damages for an ADA retaliation claim against an employer and therefore has no right to a jury trial. In *Johnson v. Ed Bozarth Chevrolet, Inc.*, 297 F. Supp. 2d 1286 (D. Colo. 2004), the court noted: "The Tenth Circuit *has not addressed* whether § 12203 provides for compensatory and punitive damages." (emphasis added)); *see also Sink v. Wal-Mart Stores*, 147 F. Supp. 2d 1085, 1101 (D. Kan. 2001); *Boe v. AlliedSignal, Inc.*, 131 F. Supp. 2d 1197, 1202-03 (D. Kan. 2001).

III. District Courts Overwhelmingly Agree That Compensatory And Punitive Damages And Trial By Jury As Of Right Are Unavailable To ADA Retaliation Plaintiffs.

In a bold, sweeping statement, Petitioner claims "the *only* federal decisions which are consistent with the Seventh Circuit's decision are from the Missouri and Kansas district courts issued *before* the Eighth Circuit's *Salitros, Foster* and *Stafne* decisions in 2002. (Br. p. 12) Petitioner is incorrect. She has overlooked a recent district court case from Colorado, mistakenly places the Kansas district courts into the Eighth Circuit, and cites cases that are not on point.

A. The Most Recent And Well-Reasoned Cases Undercut Petitioner's Analysis Of The Statutes At Issue.

Contrary to Petitioner's argument, there is no evidence that courts are in conflict and "can only become more sharply divided over time." (Br. p. 6) Courts are more and more united on the issue, not divided. A number of courts used the same analysis and reached the same conclusions as the district and appellate courts in *Kramer*.[1]

1. *Rhoads v. FDIC*, No. CCB-94-1548, 2002 WL 31755427 (D. Md. 2002) is not good law on the issue of compensatory and punitive damages for an ADA retaliation claim because, as explained above, the Fourth Circuit recently cited *Kramer* with approval and determined that such damages are unavailable. Moreover, the Seventh Circuit rejected any persuasive value in the district court's 2002 opinion in *Rhoads* because it ignored the plain text of § 1981a(a)(2) and instead inappropriately relied upon legislative history. (App. 9a)

2. *Johnson v. Ed Bozarth Chevrolet, Inc.*, 297 F. Supp. 2d 1286 (D. Colo. 2004) was decided January 14, 2004, just days before the Seventh Circuit released its opinion in *Kramer*. Without benefit of the *Kramer* appellate or district courts' analysis, the district court reached the same conclusion as those courts for the same reasons and, like the courts in *Kramer*, it rejected *Ostrach v. Regents of Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997).

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1. Other district courts did not have the benefit of Judge Zagel's May 2002 analysis in *Kramer* because his oral ruling was transcribed as part of the record in the case but was not memorialized in a written opinion or minute order that would have made it readily accessible through online research to counsel and courts in other jurisdictions.

3. In *Brown v. City of Lee's Summit, Mo.*, No. 98-0438-CV-W-2, 1999 WL 827768 (W.D. Mo. June 1,1999) the court engaged in a thorough and detailed statutory analysis and concluded that because the applicable damages section of the Civil Rights Act of 1991 does not mention the ADA's retaliation provision, 42 U.S.C. § 12203, but does specify other ADA provisions, compensatory and punitive damages are not available for a retaliation claim. Absent legal remedies, a jury trial was not available, the court held.

4. *Boe v. AlliedSignal, Inc.* 131 F. Supp. 2d 1197, 1202-03 (D. Kan. 2001) follows the reasoning in *Brown* and traces the various statutory provisions to conclude that compensatory and punitive damages – and therefore a jury trial – are not available for an ADA retaliation claim in employment.

5. *Sink v. Wal-Mart Stores, Inc.* 147 F. Supp. 2d 1085 (D. Kan. 2001) likewise concluded that the statutory language and legislative history of the ADA "simply do not support a valid basis for a claim of compensatory and punitive damages for an ADA retaliation claim." *Id.* at 1101. Because entitlement to a jury trial for an ADA claim is contingent on the availability of compensatory and punitive damages, the court in *Sink* ruled that it would hold a bench trial of the retaliation claim. *Id.* at 1088.

B. Petitioner's District Court Authorities Are Unsound.

Petitioner strains credulity with citations to cases that either are poorly reasoned or are not on point.

1. *Ostrach v. Regents of Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997) was the earliest published district court opinion to find that a plaintiff with an employment-based ADA retaliation claim could recover compensatory and punitive damages and therefore had a right to a jury trial. Courts have roundly criticized the *Ostrach* decision in numerous subsequent rulings, and rightly so. The court in *Ostrach* overlooked the crucial portion of § 1981a(a)(2) that lists the specific statutory sections for which a party may recover compensatory and punitive damages and instead determined that an employee had a general right to damages. As the Seventh Circuit noted, the court in *Ostrach* strained to reach its conclusion by excising key provisions from the statute through the use of ellipses. (App. 9a-10a) *See also Brown*, 1999 WL 827768 (the *Ostrach* court "erroneously disregarded critical statutory language" and therefore is "unreliable authority.").

2. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Me. 1994) does not address the question of whether compensatory and punitive damages, and therefore a jury trial, are available to an employee who claims retaliation under the ADA. In *Braverman*, the court dismissed the ADA retaliation claim under 42 U.S.C. § 12203 (Count IV) on summary judgment. *Id.* at 602, 604. The court's discussion of the appropriateness of a jury trial for an ADA claim was limited to the disability discrimination claim brought under subsection I of the ADA, not the retaliation claim under subsection IV of the ADA. There is no dispute here that ADA disability discrimination claimants have legal remedies and thus have a jury trial right. Petitioner's reliance on *Braverman* is misplaced – the case simply is not on point because it does not reach the retaliation question at issue here.

3. *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) is inapplicable here because it was not an employment case; it was a public accommodations case. The remedies for an ADA retaliation claim in the public accommodations context are found by tracing the statute from 42 U.S.C. § 12203 to § 12133 (under subsection II of the ADA), which in turn refers to remedies under Title VI of the Civil Rights Act. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (remedies for violation of Section II of the ADA are coextensive with remedies available in a private cause of action brought under Title VI). As the *Niece* case illustrates, Congress drafted the ADA to provide various routes to remedies for retaliation claims depending upon the setting in which the claim arises. Because *Niece* was not an employment case, it, too, is not on point.

4. *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003) also suffers from infirm analysis. The Seventh Circuit, in its *Kramer* opinion, criticized the *Lovejoy-Wilson* case for its reliance on *Muller v. Costello*, 187 F.3d 298, which did not address the underlying question of whether compensatory and punitive damages are available. (App. 8a-9a) Also, the district court in *Lovejoy-Wilson* on remand placed undue emphasis on its appellate court's use of phrases such as "a jury could conclude" and "a jury could reasonably find" to support its position that a jury trial was warranted. The appellate court in *Lovejoy-Wilson* had not expressly addressed the legal question of remedies and right to jury trial for an ADA retaliation claim.

In summary, at least seven courts (two at the appellate level and five district courts, including the lower court in *Kramer*) have reached the same conclusion – compensatory

and punitive damages are not available for an ADA retaliation claim in the employment setting and therefore plaintiffs have no right to a jury trial for such claims. Given the uniformity of well-reasoned caselaw on the issue, there is no need for guidance from this Court.

IV. Petitioner's Public Policy Argument For An Expansive View Of ADA Retaliation Remedies Holds No Sway Because Congress Unambiguously Limited The Available Remedies.

Petitioner's public policy argument for an expansive view of ADA retaliation remedies is no match for the black letter law of statutory construction: Where Congress specifically has limited the remedies, courts cannot allow for general remedies. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.")

Not only does the text of § 1981a(a)(2) specifically limit remedies for disability plaintiffs, other portions of 42 U.S.C. § 1981a also provide proof that Congress intentionally limited the remedies. For example, the statute includes caps on damages based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) The statute also excludes compensatory and punitive damages in cases where an employer acted in good faith to provide a reasonable accommodation. *See* 42 U.S.C.§ 1981a(a)(3) Petitioner's citations to cases that state that a "general right to sue means courts can use any available remedy" are inapplicable here, where the statute is narrow and specific as to the available remedies.

Moreover, in other provisions in the Civil Rights Act of 1991, Congress treated retaliation in a different manner from other forms of discrimination. For example, several appeals courts have held that the Civil Rights Act of 1991 does not permit remedies for mixed-motive retaliation claims under Title VII. *See McNutt v. Board of Trustees of Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932-36 (3d Cir. 1997); and *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996).

Just as Petitioner relies on sources outside the statute itself, so, too, did the plaintiff in *McNutt*, who argued that legislative history, the EEOC's written guidance, an employment law treatise and "common sense" supported his argument that he was entitled to remedies in a mixed-motive retaliation case. The Seventh Circuit in *McNutt* rejected the persuasive value of such authorities because the plain language of the statute showed that injunctive and monetary relief and attorneys fees were unavailable for mixed-motive retaliation claims. In so holding, the appellate court noted: "Legislation is often the product of compromises that are not readily apparent to the public or even consistent in their relation to other contemporaneous enactments from the same body. It is not the role of courts to question these kinds of seemingly inexplicable legislative choices where they are spelled out in plain statutory language." *McNutt*, 141 F.3d at 709 (citation omitted).

Petitioner's citation to the enforcement guidance from the Equal Employment Opportunity Commission, issued in 1998, is not useful here. The EEOC flatly states, without analysis or citation to any authority, that compensatory and punitive damages are available for retaliation claims under the ADA. Even if the EEOC had provided statutory analysis

to support its statement, such analysis is not entitled to any weight here. As this Court stated in an opinion earlier this term, "deference to [EEOC's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Syst., Inc. v. Cline*, __ U.S. __, 124 S. Ct. 1236, 1239 (2004) (citation omitted). There, as here, regular interpretive methods leave no serious question as to legislative intent. Thus, there is no need to resort to the EEOC's guidelines on the subject of retaliation.

Finally, the law review article that Petitioner cites[2] is of no import. The author's analysis relies heavily on *Ostrach* and engages in the same unsound reasoning that has drawn widespread criticism from other courts, not the least of which is the Seventh Circuit in its *Kramer* opinion. The clear and unambiguous text of the statute and the clear weight of authority disfavor the view raised in the article.

V. Petitioner Has Waived Any Separate Argument That She Has A Seventh Amendment Right To A Jury Trial For An ADA Retaliation Claim.

The Seventh Circuit rejected Petitioner's feeble attempt to argue that she had a constitutional right to a jury trial even if she was not entitled to recover compensatory and punitive damages. (See App. 5a, n.1) ("the absence of any supporting authority or development of an argument constitutes a waiver on appeal.")

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2. Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation,* 14 Stan. L. & Pol'y Rev. 241, 262 (2003).

Yet, Petitioner repeatedly invokes the Seventh Amendment in her petition as a separate and distinct reason for the Court to consider her case:

• She implores the Court to take her case because, she claims, the Seventh Circuit made "a serious error" that can "critically deprive victimized employees of their Seventh Amendment right to a trial by jury." (Br. p. 6)

• She claims "[a]n employee's fundamental right to a trial by jury under the ADA is at stake." (Br. p. 7-8)

• She contends that in addition to the statutory construction issue of ADA remedies, "at least equally significant is the ADA plaintiff's Seventh Amendment right to a trial by jury, an obvious cornerstone of our judicial system." (Br. p. 19)

• She seeks this Court's involvement because of the "profound impact of depriving ADA plaintiffs of their Seventh Amendment right to a jury trial." (Br. p. 25).

To the extent that Petitioner argues that there is a constitutional right to a jury trial for an ADA retaliation claim even if there is no statutory entitlement to compensatory and punitive damages, she waived the argument by her failure to develop it in the lower court.

Moreover, Petitioner's prediction of dire constitutional consequences arising from the Seventh Circuit's ruling is unvarnished hyperbole. It is undisputed that if Congress had allowed for the legal remedies of compensatory and punitive damages for an ADA retaliation claim in employment – which it did not – then claimants would be entitled to a jury trial.

However, since the only available remedies are equitable ones, the Seventh Amendment right to a jury trial is not implicated here.

CONCLUSION

For the reasons stated, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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